**HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI**
**AND**
**HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY**

**Writ Petition No.4858 of 2007**

**Between:**

Dr.Koppula Krishna & another

... Petitioners

**And**

State Bank of Hyderabad,
Asset Management Branch,
Hyderabad, rep. by its Asst.
General Manager & others.

... Respondents

**:: ORDER ::**

Counsel for the Petitioners: Shri Subrahmanyam Kurella

**March 09, 2007**

**Per G.S. Singhvi, CJ**

This petition filed by Dr.Koppula Krishna and his wife Smt.Mangarani for restraining the respondents from auctioning house property bearing No.8-5-188/1 (old), 8-5-319 (new) situated at Laxminagar, Karimnagar is representative of large number of cases instituted by those who take loans or avail financial facilities from bank and other public bodies/ institutions/organizations, but do not repay the same and use the process of the Courts to frustrate the proceedings initiated by the banks etc. for recovery of their dues.

The petitioners took medium term loan of Rs.10,00,000/- from State Bank of Hyderabad (for short, 'the bank'), but did not repay the same as per the conditions of sanction. Therefore, the bank initiated action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the 2002 Act') for recovery of the amount due. In the first instance, notice dated 26-3-2003 was issued under Section 13 (2), whereby the petitioners were called upon to pay the outstanding dues within sixty days. This was followed by notice dated 3-7-2003 issued under Section 13 (4) of the 2002 Act for taking possession. The petitioners challenged the same by filing an application under Section 17 (1) of the 2002 Act, which was registered as S.A.No.152 of 2004. The Debts Recovery Tribunal, Hyderabad (for short, 'the Tribunal') stayed the proceedings initiated by the bank. The S.A. was dismissed on 28-2-2006 because no one appeared on behalf of the petitioners.

In the meanwhile, the bank filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, 'the 1993 Act') for recovery of Rs.16,80,396.55

ps. with interest @ 16% per annum. By an order dated 13-2-2006, the Tribunal allowed the application and declared that defendant Nos.1 and 2 (the petitioners herein) are jointly and severally liable to pay the amount with costs and future interest @ 16% per annum with quarterly rests from the date of filing of the O.A. till the date of realization. After three weeks, the Tribunal issued recovery certificate dated
8-3-2006 under Section 19 (22) of the 1993 Act entitling the bank to recover a sum of Rs.17,98,00,035.55 ps. This included a sum of Rs.98,639/- representing interest for the period from
28-10-2005 to 8-3-2006.

After sometime, the bank filed R.P.No.23 of 2006 and succeeded in persuading the Recovery Officer of the Tribunal (respondent No.2) to issue order dated 27-10-2006 for attachment of the house property in question by invoking the provisions of Rule 48 of the II Schedule appended to the Income Tax Act, 1961. As a sequel to this, respondent No.2 issued notice dated 5-2-2007 for sale of the property.

Three days before the attachment of their house property, the petitioners filed M.A.No.65 of 2006 under Section 22G of the 1993 Act for setting aside order dated 13-2-2006 passed by the Tribunal in O.A.No.202 of 2005 by asserting that ex parte proceedings held against them is vitiated due to violation of the rules of natural justice. They also pleaded that after having initiated action under the 2002 Act, the bank could not have resorted to the provisions of the 1993 Act.

The bank filed detailed reply to contest the prayer of the petitioners. In his affidavit, Shri B. Bhaskara Sastry, Chief Manager of the bank controverted the theory put forward by the

petitioners that they came to know about the proposed sale from notice published in Praja Sakthi Newspaper dated 27-9-2006. According to Shri Sastry, no such notice was published by the bank or the Recovery Officer. He also denied the petitioners' assertion that they were not served with the summons of O.A.No.202 of 2005 and pleaded that the petitioners deliberately refrained from contesting the application despite the fact that they know about the proceedings initiated by the bank.

Shri Subramanyam Kurella, learned counsel for the petitioners made strenuous efforts to persuade us to stall the sale of the property by arguing that after having invoked the provisions of the 2002 Act, the bank was not entitled to file application under Section 19 of the 1993 Act and the Tribunal committed a jurisdictional error by entertaining the same.

We have considered the submission of the learned counsel, but have not felt impressed. In our opinion, there is no conflict between the provisions of the two Acts and the doctrine of election cannot be invoked for nullifying order dated 13-2-2006 passed by the Tribunal on the premise that the bank had already taken action under the 2002 Act. The question whether, during the pendency of an application filed under Section 19 of the 1993 Act, the secured creditor can resort to the provisions of the 2002 Act was recently considered by the Supreme Court in **M/s.Transcore v. Union of India and another**[1]. After an in-depth analysis of the provisions of the two Acts, the Supreme Court laid down the following propositions:

1) On reading Section 13(2), which is the heart of the controversy in the present case, one finds that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-

performing asset then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4). Reading Section 13(2) it is clear that the said sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as sub-standard, doubtful or loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/ FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability. Section 13 deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other. There is no inherent or implied inconsistency between these two remedies under the two different Acts. Therefore, the doctrine of election has no application in this case. Section 13(3) inter alia states that the notice under Section 13(2) shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank/ FI. In the event of non-payment of secured debts by the borrower, notice under Section 13(2) is given as a notice of demand. It is very similar to notice of demand under Section 156 of the Income Tax Act, 1961. After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section 13(3-A) inserted by amending Act 30 of 2004 after the judgment of this Court in Mardia Chemicals (supra), whereby the borrower is permitted to make representation/ objection to the secured creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under Section 13(3-A), if the bank/FI comes

to the conclusion that such objection is not acceptable, it shall communicate within one week the reasons for non-acceptance of the representation/ objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to the DRT under Section 17. The scheme of sub-sections (2), (3) and (3-A) of Section 13 of NPA Act shows that the notice under Section 13(2) is not merely a show cause notice, it is a notice of demand. That notice of demand is based on the footing that the debtor is under a liability and that his account in respect of such liability has become sub-standard, doubtful or loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI. Such notice of demand, therefore, constitutes an action taken under the provisions of NPA Act and such notice of demand cannot be compared to a show cause notice. In fact, because it is a notice of demand which constitutes an action, Section 13(3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of Section 13(4) of NPA Act by the bank/FI. Once the two conditions under Section 13(2) are fulfilled, the next step which the bank or FI is entitled to take is either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt.

2) Reading the scheme of Section 13(2) with Section 13(4), it is clear that the notice under Section 13(2) is not a mere show cause notice and it constitutes an action taken by the bank/ FI for the purposes of the NPA Act. Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of

such secured asset. Therefore, Section 13(6) inter alia provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the secured creditor would be entitled to give a clear title to the transferee in respect thereof. Section 13(7) refers to recovery of all costs, charges and expenses incurred by the bank/FI for taking action under Section 13(4). Section 13(7) provides for priority in the matter of recovery of dues from the borrower. It inter alia provides for payment of surplus to the person entitled thereto. Section 13(8) inter alia states that if the dues of the secured creditor together with all costs, charges and expenses incurred are tendered to the secured creditor before the debt fixed for sale/transfer, the secured asset shall not be sold or transferred by the bank/FI to the asset reconstruction company and no further steps shall be taken in that regard. Section 13(9) inter alia states that where a financial asset is funded by more than one bank/FI or in case of joint financing by a consortium, no single secured creditor from that consortium shall be entitled to exercise right under Section 13(4) unless exercise of such right is agreed upon by all the secured creditors. Section 13(9) provides for one more instance when permission of DRT may be required under the first proviso to Section 19(1) of the DRT Act. The agreement between the secured creditors in such cases is required to be placed before the DRT not as a fetter on the rights of the secured creditors but out of abundant caution. Generally, such agreements are complex in measure, particularly because rights of each of the secured creditor in the consortium may be required to be looked into. However, if before the DRT, all the secured creditors in such consortium enter into an agreement under Section 13(9) then no such further inquiry is required to be made by the DRT. In such cases, the DRT has only to see that all the secured creditors in the consortium are represented under the agreement. The point to be noted is that the scheme of

the NPA Act does not deal with disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallized and that his account is classified as non-performing asset in the hands of the bank/FI. Section 13(9) also deals with pari passu charge of the workers under Section 529-A of the Companies Act, 1956, apart from banks and financial institutions, who are secured creditors. Section 13(10) inter alia states that where the dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application to DRT under Section 17 of the NPA Act for recovery of balance amount from the borrower. Section 13(10), therefore, shows that the bank/ FI is not only free to move under NPA Act with or without leave of DRT but having invoked NPA Act, liberty is given statutorily to the secured creditors (banks/ FIs.) to move the DRT under the DRT Act once again for recovery of the balance in cases where the action taken under Section 13(4) of the NPA Act does not result in full liquidation of recovery of the debts due to the secured creditors. Section 13(10) fortifies our view that the remedies for recovery of debts under the DRT Act and the NPA Act are complementary to each other. Further, Section 13(10) shows that the first proviso to Section 19(1) of DRT Act is an enabling provision and that the said provision cannot be read as a condition precedent to taking recourse to NPA Act. Section 13(11) of the NPA Act inter alia states that, without prejudice to the rights conferred on the secured creditor under Section 13, the secured creditor shall be entitled to proceed against the guarantor/pledgor; that the secured creditor shall be entitled to sell the pledged assets without taking recourse under Section 13(4) against the principal borrower in relation to the secured assets under the NPA Act. Section 13(13) states that, no borrower shall, after receipt of notice under Section 13(2), transfer by way of sale, lease or otherwise any of his secured assets referred to in the

notice, without prior written consent of the secured creditor. Thus, Section 13(13) further fortifies our view that notice under Section 13(2) is not merely a show cause notice. In fact, Section 13(13) indicates that the notice under Section 13(2) in effect operates as an attachment/ injunction restraining the borrower from disposing of the secured assets and, therefore, such a notice, which in the present case is dated 6.1.2003, is not a mere show cause notice but it is an action taken under the provision of the NPA Act.

3) Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g., for the sake of argument, if in the given case the measures undertaken by the secured creditor under Section 13(4) comes in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no application to the present case."

In our opinion, the propositions laid down in the aforementioned case will hold good even in a reverse situation like the present one where the bank had initiated action under the 2002 Act in the first instance and then filed an application under Section 19 of the 1993 Act because notices issued under Section 13 (2) and 13 (4) of the

2002 Act were frustrated by virtue of injunction granted by the Tribunal in S.A.No.152 of 2004. In our view, the two enactments operating the same field are complimentary to each other and the secured creditor can resort to either or both of them for recovery of the dues of loan etc.

The next contention urged by learned counsel for the petitioners is that during the pendency of the application filed by them for recall of order dated 13-2-2006, respondent No.2 should not have entertained the application filed by the bank for attachment of the property and, in any case, the same cannot be auctioned for realization of the dues of the bank because there is every likelihood of order dated 13-2-2006 being set aside on the ground of violation of the rules of natural justice. He then submitted that even though the petitioners have shown inclination to repay the entire amount in terms of the compromise offer made to the bank, the latter is insisting on taking coercive action for realization of its so-called dues.

In the context of the last mentioned submission of the learned counsel, it is apposite to reproduce the relevant portions of letter dated 21-11-2006 sent by Assistant General Manager of the bank. The same read as under:

> "Dr.Koppula Krishna,
> H.No.12-13-1179/A,
> Street No.10,
> Tarnaka, SECUNDERABAD – 17.
>
> Dear Sir,
>
> **RE: COMPROMISE OFFER**
>
> With reference to the compromise offer made by you vide letter dated 20.11.2006, we have pleasure in advising you that the competent authority has approved the offer with the following conditions:

01. The amount of compromise will be Rs.19.00 lacs.
02. Payment schedule:

| DUE DATE | Payment Terms |
|---|---|
| On conveying approval (Down payment will be appropriated) | Rs.1.00 lacs |
| On or before 25.12.2006 | Rs.5.00 lacs. |
| 28.2.2007 | Rs.13.00 lacs |
| Total: | Rs.19.00 lacs |
| No interest will be charged if the amount is paid as per above schedule | |

03. In case of default in payment of any of the instalments or part thereof, the bank shall be at liberty to execute the Recovery Certificate issued in O.A.No.202 of 2005 for the decretal amount after giving credit to the payment made. So, in case of any default, the Bank shall not sacrifice any amount and the defendants will remain liable to pay the entire dues. The assets charged to the Bank shall continue to be the securities until full amount is paid as per terms and conditions.
04. The compromise stand cancelled automatically without any notice to defendants if there is any default in payment of the any agreed instalment or part thereof or interest and the entire dues without any concession will become payable forthwith and bank shall proceed with further action under SARFAESI Act/DRT Act for recovery of the total dues as claimed in the suit.
05. The compromise is approved without any prejudice to the suit pending against the borrower and guarantors in DRT/Action initiated under SARFACI Act, if any."

A reading of the above reproduced letter makes it clear that the petitioners had agreed to pay Rs.19.00 lacs. in three instalments of Rs.1.00 lac., Rs.5.00 lacs. and Rs.13 lacs. According to Shri Subramanyam Kurella, his clients had paid Rs.1.00 lac, but could not pay the remaining instalments due to financial stringency. This only

goes to show that even though the offer made by the petitioners to repay the outstanding dues was accepted by the respondent, they did not fulfill their promise. In our opinion, persistent failure of the petitioners to repay the dues of the bank in accordance with the conditions of sanction, order dated 13-2-2006 passed by the Tribunal and the compromise offer, which was accepted by the bank, clearly demonstrates their ulterior motive to somehow or the other frustrate the proceedings instituted by the bank for recovery of the public dues. Therefore, keeping in view the settled law that the High Court will not exercise its power under Article 226 of the Constitution of India in favour of a person who is guilty of contumacious conduct, we decline the petitioners' prayer for staying the impending sale of the house property or restrain the respondents from realising the dues of the bank.

The petitioners' plea of violation of the rules of natural justice cannot be entertained because the application made by them for recalling order dated 13-2-2006 is pending before the Tribunal and they have not shown any interest in expeditious adjudication of the same.

Learned counsel for the petitioners made a feeble attempt to convince us to entertain the writ petition by asserting that the Tribunal is not holding its sittings at Hyderabad, but we are not inclined to accept the same because no such grievance is shown to have been made by their clients by filing appropriate application before the Tribunal.

With the above observations, the writ petition is dismissed.

As a sequel to dismissal of the writ petition, WPMP No. 6218 of 2007 filed by the petitioners for interim relief is disposed of as infructuous.

**G.S. SINGHVI, CJ**

March 09, 2007

**C.V. NAGARJUNA REDDY, J**

svs

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[1] 2007 (1) ALD 109 (SC)